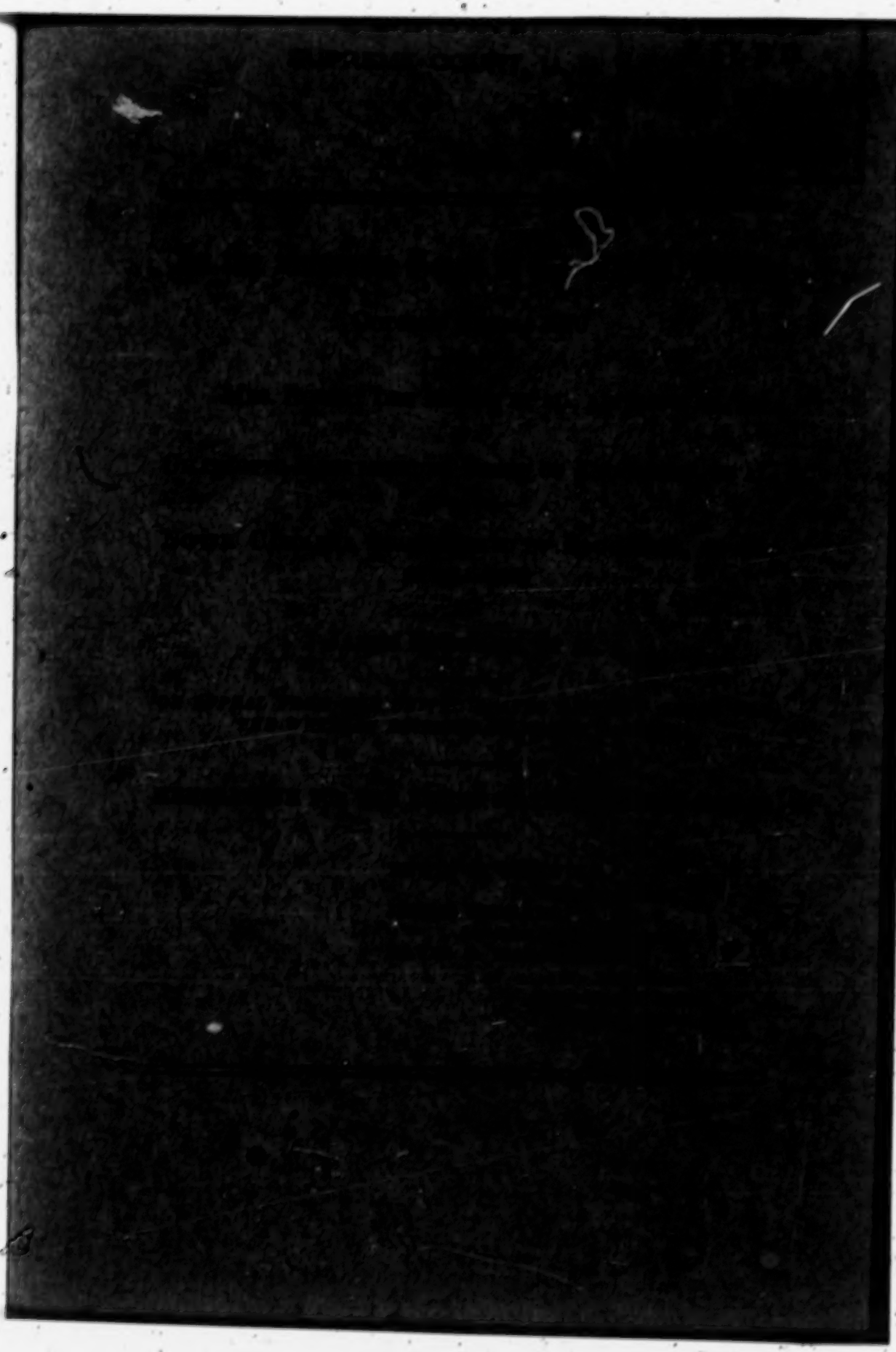

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 444

MRS. ROBERT LEE MOORE, ET AL., APPELLANTS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION, ET AL., APPELLANTS

v.

JAMES E. SWANN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

These actions are before the Court on direct appeals from the decision of a three-judge district court[1] holding unconstitutional and enjoining enforcement of a portion of a North Carolina statute on the ground that the statute conflicts with the Fourteenth Amend-

[1] The opinion of the court below in these (consolidated) cases is reported at 312 F. Supp. 503 (W.D.N.C.). The court's judgment, entered subsequently on June 22, 1970, is set forth in the jurisdictional statements at pp. 20a–22a (No. 444) and pp. 14–15 (No. 498).

405-744—70

ment by interfering with the obligation of public school boards to effectuate desegregation of student bodies.[2] Appellees in No. 498; the plaintiffs in the district court, have filed a motion to affirm the judgment of that court or, in the alternative, to dismiss the appeal on the ground that a three-judge court was not required.[3]

INTEREST OF THE UNITED STATES

The North Carolina statute relates directly to the matter of pupil desegregation and would, if implemented, impair the ability of school officials to comply with orders of federal courts, including orders in cases in which the United States is a party, and with plans approved by the Department of Health, Education, and Welfare. In addition, the United States has an interest in the interpretation of, and judicial administration under, 28 U.S.C. 2281.[4]

---

[2] The statute, N.C. Gen. Stat. § 115–176.1 (Supp. 1969), is set forth in its entirety in the Appendix, *infra*. The part which was held to be invalid provides as follows:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

[3] Because the two cases involve the same issues, this Court's decision in No. 498 will necessarily also determine the outcome of No. 444.

[4] 28 U.S.C. 2281 provides as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of

In our view, these actions were not required to be adjudicated by a three-judge court and the motion to dismiss should therefore be granted. In the alternative, even if the constitutional issue was substantial, its determination by the court below was correct and should, accordingly, be affirmed.

ARGUMENT

1. As the court below held, the challenged provision of the North Carolina statute runs directly counter to the principle that school officials in districts that had state-compelled dual systems have an affirmative obligation to convert to a unitary system. See *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Green* v. *County School Board*, 391 U.S. 430, 437–438, and cases there cited. In many cases, neither freedom-of-choice nor "racially neutral" zoning is adequate to disestablish the former dual system. Other steps, such as pairing or consolidating schools, redrawing boundary lines, restructuring transportation routes, or any combination of these, may be required.[5]

---

such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[5] See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, Nos. 14,517, 14,518 (C.A. 4, May 26, 1970); *Nesbit* v. *Statesville City Board of Education*, 418 F. 2d 1040 (C.A. 4); *Allen* v. *Board of Public Instruction of Broward County*, No. 30,032 (C.A. 5, Aug. 18, 1970); *Henry* v. *Clarksdale Municipal Separate School District*, 409 F. 2d 682 (C.A. 5), certiorari denied,

And, of course, race must ordinarily be considered in determining the method of pupil assignment when a school system is desegregating pursuant to a court order or to a voluntary plan. To do otherwise would be to attempt a solution without recognizing the problem. Since it is beyond the power of state legislatures to prevent implementation of constitutionally required desegregation plans, *Cooper* v. *Aaron*, 358 U.S. 1, 17–18; *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 925 (E.D. La.), affirmed, 365 U.S. 569, and since the North Carolina statute does just that by forbidding a means of achieving desegregation which may be required under *Green* and other federal court decisions, the statute is contrary to the Constitution, as the district court held.

2. The three-judge court enjoined the operation of a state-wide statute because it was unconstitutional and in this respect the case appears to fall literally within 28 U.S.C. 2281, so that direct appeal to this Court under 28 U.S.C. 1253 would lie. However, the circumstance that, as applied in this case, the statute directly contravenes, indeed seeks to overrule, an outstanding order of a federal judge puts the case in a different light. The convening of a three-judge court in this situation, with the consequent right to appeal directly to this Court, constitutes, in effect, a means of by-passing the court of appeals, the proper forum

396 U.S. 940; *id.*, No. 29,165 (C.A. 5, Aug. 12, 1970); *United States* v. *School District 151*, 404 F. 2d 1125 (C.A. 7); *id.*, No. 17,754 (C.A. 7, Sept. 8, 1970); *Clark* v. *Board of Education of the Little Rock School District*, 426 F. 2d 1035 (C.A. 8); *United States* v. *Board of Education*, No. 338–69 (C.A. 10, July 28, 1970) (Tulsa).

for contesting the federal judge's order. In addition, a ruling by the three-judge court that such a state statute is valid, while unlikely, would create confusion and uncertainty over the single judge's order. For these reasons the effect of an intervening and conflicting state statute should be addressed to the single district judge and appeal from an adverse decision should be taken to the court of appeals. *Swift & Co.* v. *Wickham*, 382 U.S. 111, is apposite: the rationale of this Court's holding that three-judge courts are not appropriate for adjudication of claims that state statutes are invalid under the Supremacy Clause applies whether the claim is bottomed on a conflict with a federal statute or with an order of a federal judge.

We recognize, of course, that the court below did not find the statute invalid under the Supremacy Clause, although that may have been all that was necessary for decision, but rather enjoined the statute's operation on the ground that it violated the Fourteenth Amendment. Even so, a court of three judges was not required. For *Bailey* v. *Patterson*, 369 U.S. 31, 33 (see, also, *Turner* v. *City of Memphis*, 369 U.S. 350, 353), settles that in cases where prior decisions clearly indicate the state enactment contravenes the Constitution a single judge may decide the matter. And, in our view, the inconsistency between the provisions of the North Carolina statute and the requirements of the Equal Protection Clause is so

apparent that the present actions fall within the rule of *Bailey* v. *Patterson*.[6]

CONCLUSION

For the foregoing reasons, the Court should grant the motion to dismiss or, alternatively, the motion to affirm.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.
DAVID B. MARBLESTONE,
Attorney.

OCTOBER 1970.

---

[6] See *Alabama* v. *United States*, No. 5935–70–P (S.D. Ala., June 26, 1970), where it was held that a suit by the state involving the validity of a similar state law presented "no substantial federal question." See, also, *United States* v. *Franklin Parish School Board*, No. 15,632 (W.D. La., August 20, 1970).

APPENDIX

THE NORTH CAROLINA GENERAL ASSEMBLY

1969 SESSION

RATIFIED BILL

CHAPTER 1274

HOUSE BILL 990

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new section of Chapter 115 of the General Statutes to be codified as GS 115–176.1 and to read as follows:

"§ 115–176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of edu-

cation of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended conditions or other circumstances which, in the sole discretion of the School Board, require assignment or reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

In the General Assembly read three times and ratified, this the 2nd day of July, 1969.

H. P. TAYLOR, JR.

H. P. Taylor, Jr.
President of the Senate.

Philip P. Godwin

Philip P. Godwin
Speaker of the House of Representatives

U.S. GOVERNMENT PRINTING OFFICE: 1970